

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2243

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICK DEMAURO,

Plaintiff-Appellee,

—against—

CENTRAL GULF SS CORP.,

Defendant and Third Party

Plaintiff-Appellee-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

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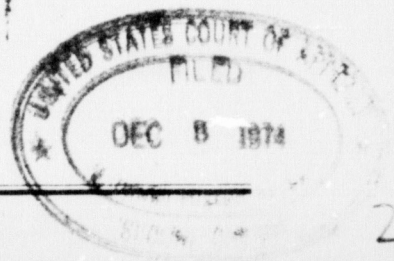


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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

Statement

This is an appeal by the third party defendant-appellant (I.T.O.) from a judgment in favor of the plaintiff (DeMauro) against the defendant (Central) in the sum of \$200,000 and a judgment in favor of Central in the same amount for indemnity against I.T.O. This case was tried before Judge John M. Cannella and a jury on February 22, 25, 26, 27, 28 and March 1, 1974.

On March 6, 1974 a judgment was entered. Subsequent to the entry of this judgment I.T.O. made a motion for judgment notwithstanding the verdict or in the alternative for a new trial which was denied by Judge Cannella on April 8, 1974. During the course of the trial the issue with respect to counsel fees, costs and disbursements to be awarded to Central was reserved to the Court and since this could not be resolved between counsel a trial with respect to these issues was held before Judge Cannella on June 17, 18 and July 11, 1974. Thereafter a decision was rendered awarding counsel fees in the sum of \$12,437.40 to the defendant and on August 22, 1974 an amended judgment was entered in this case which amended the judgment previously entered so as to include the award of counsel fees, costs and disbursements in the amount of \$12,437.40. It is from this amended judgment that I.T.O. filed a notice of appeal on September 13, 1974. DeMauro's motion to dismiss the appeal was denied by this court from the bench on November 19, 1974.

The Facts

On March 31, 1971 DeMauro was a longshoreman, employed by I.T.O. and working aboard the SS GREENPORT, a vessel owned by CENTRAL. DeMauro testified that he had worked in the #4 upper 'tween deck of the SS GREENPORT on March 30, 1971, the day before the accident (19A),* and went into the #4 lower 'tween deck level on March 31, 1971, the day of the accident, at approximately 8:10 A.M. (20A, 21A). It was DeMauro's testimony that he was working with several other longshoremen discharging palletized cargo with the use of a hi-lo (22A) and, at the time of the accident, he was carrying a piece of dunnage

* References are to the pages of Record on Appeal.

approximately 6' away from some heavy cases which suddenly fell over and struck him (24A, 25A).

DeMauro testified that neither he nor any other of his fellow longshoremen went anywhere near or touched these cases (26A) and that the hi-lo was 15' away from these cases when they fell (26a-27a). He further testified that these cases were stowed on top of some pipe (49A, 50A), that there was nothing in front of these cases (50A) and that the palletized cargo which he and his fellow longshoremen were in the process of removing was not supporting these cases (57A, 58A, 70A).

DeMauro and the witnesses who testified on his behalf, HUGH PRATT, STEVEN GOCH, JOSEPH VOSK and STEPHEN MENOSKY, all testified that these cases were not braced, shored or secured in any way (90A), although HUGH PRATT testified that there were two boards nailed to these cases and to a fence to keep them from falling on a cargo of jeeps (98A, 106A). PRATT also testified that there was a space of approximately 18" separating these cases from a cargo fence which separated the #4 and #5 hatches. JOSEPH VOSK, the hi-lo operator, testified that he was removing palletized cargo with a hi-lo and that this cargo and the hi-lo was 15 or 20' away from the spot where the cases fell (79A-90A, 91A, 92A), that his machine had not touched these cases at any time and that he did not see any longshoremen go near or touch any of the cases which subsequently fell on DeMauro (79A).

Central produced a maritime expert, CAPTAIN WILLIAM WHEELER, who interpreted the log entries indicating that the SS GREENPORT had a rough voyage from Oakland, California, along the California coast through the Panama Canal and up the eastern seaboard before it arrived at Bayonne, New Jersey (317A-322A). CAPTAIN

WHEELER, in answer to a hypothetical question, said that these cases would never have stayed in place without shoring or securing and would have fallen into the 18" space separating these cases from the palletized cargo and the fence separating the #4 and #5 hatches (323A-325A).

CAPTAIN WHEELER further testified that stowage of cargo was the responsibility of the ship unless "they could lay it off on the stevedore" and that was what the mate was there for. A series of photographs were marked in evidence and CAPTAIN WHEELER conceded that the wood shown in these photographs was wood that normally would be used for shoring (375A, 380A, 382A, 383A, 384A). CAPTAIN WHEELER further testified that if there was no shoring supporting these cases and cargo, which constituted lateral support, was removed, this would not cause the cases to fall. It was his testimony that these cases would not fall of their own volition and that some force would have to act upon these cases to knock them over (365A, 366A).

VICTOR PINTO testified on behalf of I.T.O. to the effect that he had inspected the SS GREENPORT on March 30, 1971, the day before the accident (393A), that he saw these cases with the fence and shoring supporting the cases and that they looked secure to him (394A). He also testified that the palletized cargo was 18" away from these cases and was not supporting the cases (395A). It was his testimony that after the accident happened he went into the #4 hatch and when shown the photographs, which are Plaintiff's Exhibits 4, 5, 6 and 7, he testified that that was the way the scene of the accident looked as he saw it and he placed a series of "S" marks on the wood under the cases which he identified as shoring (397A-400A).

VICTOR PINTO, in addition to being the stevedore's safety man, also prepared the accident report which is Exhibit 17 and reads

"While discharging cargo in the wing, the cargo gave way and broke through the shoring and fell on man's leg due to the latent defect of stowage." (401A-409A).

VICTOR PINTO testified that the wood shown in the photographs, Exhibits 4, 5, 6 and 7, was in fact the shoring that he had seen holding up these cases when he inspected the #4 lower 'tween deck of the SS GREENPORT on March 30, 1971 (397A-400A).

SANTIAGO GONZALEZ, the Chief Mate aboard the SS GREENPORT, testified by deposition on February 1, 1974, which deposition was read at the trial, that these cases were stowed aboard the vessel in Oakland, California. He further testified that the lower 'tween deck of the #4 hatch had been inspected by ship's personnel after the loading operations were commenced and that when the loading operations were completed in Oakland the lower 'tween deck of the #4 and 5 hatches was again inspected by him (261A).

GONZALEZ further testified that it was part of his job to supervise the work of the longshoremen to see that they discharged the vessel properly (142A). On March 31, 1971, GONZALEZ was in charge of discharging the ship and had the third mate on duty to see that ITO discharged the cargo properly (141A, 142A). He further testified that if either he or the third mate had seen any activity in the cargo hatch which was considered to be improper or unsafe that they would have stopped the longshoremen from conducting such activities but at no time on March 31, 1971 did either he or the third mate have any complaint with the

way the stevedoring operations were being conducted by I.T.O.

PAUL KEELER, an expert called on behalf of I.T.O., testified that the cases which fell upon the plaintiff should have been chocked or shored after they were stowed on top of the cargo of pipes (422A). KEELER further testified that without shoring or chocking to secure these cases it would have been impossible for the cases to have remained in place on top of the pipes upon which they were stowed (430A, 431A). KEELER also testified that stowage of cargo was the responsibility of the vessel (431A, 432A, 433A). In addition, KEELER testified that the boards shown in Exhibits 4, 5, 6 and 7 were boards that would be used for shoring (438A, 439A). KEELER further testified that if cargo falls without being moved, touched or dislodged by anything that that was an improper stow (447A).

At the conclusion of all the testimony in this case counsel for Central moved to dismiss the complaint, which motion was denied (504A) and counsel for I.T.O. moved for a directed verdict in its favor, which motion was also denied (505A). Counsel for DeMauro then stated that it was his understanding that the attorney for Central had withdrawn his defense of contributory negligence and he moved for a directed verdict on the issue of unseaworthiness and stated to the Court that, if his motion were granted on that issue, he would withdraw his claim of negligence (505A). At this point the Court granted the motion for a directed verdict on the issue of unseaworthiness and indicated that the case would go to the jury on the question of damages as between Central and DeMauro together with the issues of the third party complaint of Central against I.T.O. (506A). The Court thus took away

from the jury the issues of contributory negligence and unseaworthiness despite the fact that there were questions of fact properly within the province of the jury in connection with the issues of contributory negligence and unseaworthiness.

POINT I

The Testimony in This Case Presented Questions of Fact for Jury Determination and the Court Was in Error in Directing a Verdict in Favor of the Plaintiff on the Issue of Unseaworthiness and Thereby Also Withdrawing From the Jury's Province the Issue of Plaintiff's Contributory Negligence.

On the basis of the testimony in this case, given by DeMauro's witnesses as well as those called by Central and I.T.O. questions of fact were raised which were solely within the province of the jury on both the issues of negligence and unseaworthiness.

Although DeMauro testified that neither he nor any of his fellow longshoremen went near or touched the cases which ultimately fell on him (26A, 51A), he also testified that he was in the lower 'tween deck of the #4 hatch on March 30, 1971, the day before the accident, and that he saw these cases stowed on top of pipe alongside of palletized cargo (48A).

He further testified that four of these heavy cases were stowed one on top of the other on top of pipe which was uneven and which he could see at a glance since it was obvious to him (51A, 52A). In addition it was his testimony that there was nothing in front of these cases to brace, shore or support them (50A).

Despite the fact that he saw this condition which was open and obvious to him (52A) and, according to his testimony, should have been recognizable as a dangerous condition since it was his claim that the cases were not braced or supported in any way, he continued working for a period of approximately 30 minutes in the vicinity of these cases (4A-55A) and was actually walking in front of them carrying a piece of dunnage when they fell (24A).

There was a question of fact raised as to whether plaintiff was guilty of contributory negligence. In addition, and in view of CAPTAIN WHEELER'S testimony that these cases would not fall even though they were not shored or braced unless some force acted upon them causing them to fall, a question was raised as to whether the condition of these cases at the time of DeMauro's accident was an unseaworthy condition.

There was thus testimony in this case from which the jury could have found contributory negligence on the part of the plaintiff and could have evaluated the percentage of such contributory negligence had not the Court permitted the issues of negligence on the part of the defendant and contributory negligence on the part of the plaintiff to be withdrawn and directed a verdict in favor of the plaintiff on the issue of unseaworthiness.

Certainly there was a question of fact as to whether the cases which ultimately fell upon the plaintiff were shored and secured at the time of the accident or whether these cases were standing free and without any shoring after the alleged lateral support of the palletized cargo had been removed. Either way there was a question of fact for jury determination as to whether the condition of this stow and particularly the cases which fell upon the plaintiff constituted an unseaworthy condition. The question of a

vessel's unseaworthiness is ordinarily a question of fact. *Case v. D. F. McDuffie, Inc.*, 502 F. 2d 969 and cases cited therein (p. 970).

The law is well settled to the effect that a verdict should not be directed by the Court where there are questions of fact for jury determination. As this Court said in *Armstrong v. Commerce Tankers Corp.*, 423 F. 2d 957, 959:

"Whether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. 5 J. Moore, Federal Practice, ¶50; 2 [1] (2d ed.); F. James, Civil Procedure §7.11, pp. 277-279 (1965)."

The evidence in this case was not so overwhelmingly in favor of the plaintiff that the jury could not have arrived at a defendant's verdict. There was indeed testimony in the record from which the jury could have found that the vessel was not unseaworthy and that the cases fell upon the plaintiff because of some force exerted upon them for which the defendant was not responsible. CAPTAIN WHEELER, defendant's maritime expert, in fact testified that it would be possible for the vibrations of a forklift truck working in the area to cause these cases to fall. Obviously any movement of the ship under these conditions would also cause the cases to fall even though the ship was moored to a dock at the time of the accident. Instantaneous

operational negligence of the stevedore would not make a vessel unseaworthy. *Usner v. Luckenbach*, 91 S. Ct. 514.

The warranty of seaworthiness does not require that the plaintiff be furnished an accident proof ship. Nor does it make the defendant an insurer of the plaintiff's safety. *Mitchell v. Trawler Racer Inc.*, 362 U.S. 539.

In a very recent decision this Court in *Tobin v. Slutsky*, No. 31, Sept. Term 1974, (Docket 74-1179) decided November 7, 1974 held that a hotel is not an insurer and proof of injury to a guest by a hotel employee does not entitle a plaintiff to a directed verdict. In the *Tobin* case the Trial Court directed a verdict for the plaintiff on the issue of liability and allowed the jury to determine damages. This Court reversed holding that the District Judge erred in taking the issue from the jury. See also *Sotell v. Maritime Overseas Inc.*, 474 F. 2d 794 (2d Cir. 1973), in which this Court held that in order for the Court to direct a verdict in favor of the plaintiff the evidence must be such that reasonable men could not find for the defendant. What reasonable inferences can be drawn from the probable explanations for the accident is decisive on a motion for a directed verdict. *Eldred v. Town of Barton, New York*, No. 52, Sept. Term 1974, Docket No. 73-2782, decided by this Court on November 25, 1974.

In the case at bar there was ample evidence and testimony from which the jury, as reasonable men, could have found in favor of the defendant on the issue of unseaworthiness.

In *Boeing Company v. Shipman*, 411 F. 2d 365 (5th Cir. 1969), the Court of Appeals for the Fifth Circuit stated the rule at Pages 374 and 375:

"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider

all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.”

In the case at bar there was testimony and evidence of such weight that reasonable and fair minded men in the exercise of impartial judgment could have reached different conclusions and under these circumstances plaintiff's motion for a directed verdict on the issue of unseaworthiness should have been denied and the case should have been submitted to the jury for determination. In dealing with motions for a directed verdict during the course of a trial the determining factor is whether looking only to the evidence and reasonable inferences which tend to support

the case of the non-moving party there is sufficient evidence to go to the jury. *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413; *Bigelow v. Agway Inc.*, No. 69, Sept. Term 1974, Docket No. 74-1268, decided by this Court on November 21, 1974. *Compton v. Luckenbach Overseas Corporation*, 425 F. 2d 1130 (2d Cir. 1970). The function of a reviewing court then is to examine the entire record to determine whether there were any jury questions.

In *Wilkerson v. McCarthy*, *supra*, the Supreme Court of the United States reversed a directed verdict in favor of the defendant railroad holding that there were many arguments that could have been presented to the jury which might have persuaded the jury that the railroad was negligent and the same was true as to whether the plaintiff was guilty of contributory negligence. Under these circumstances the Court said that the case should have been submitted to the jury and it was error for the Trial Court to have directed a verdict in favor of the defendant.

It is apparent that the cases which fell upon DeMauro could not have survived a stormy voyage from California through the Panama Canal and thence to Bayonne, New Jersey, and remained on top of the pipe without any shoring or bracing particularly since there was an 18" space between these cases and the adjoining palletized cargo which was not supporting the cases. Since the shoring is shown underneath the cases in the photographs which were taken shortly after the accident there was a question of fact respecting the shoring being in place when the accident happened and the cases breaking through the shoring before striking the plaintiff. On this version of the accident the vessel could have been found not to have been unseaworthy.

Even on DeMauro's version of the accident which indicated that the cases were not shored and were stand-

ing free after the alleged lateral support of the palletized cargo had been removed there was a question of fact for the jury as to whether this alone created an unseaworthy condition absent any force being applied to the cases. The mere happening of an accident does not make a vessel unseaworthy. *In re Marine Sulphur Queen*, 460 F. 2d 89 (2 Cir. 1972), *Mosley v. Cia Mar Adra, S.A.*, 314 F. 2d 223 (2 Cir. 1963), *Nuzzo v. Rederi A/S Wallenco*, 304 F. 2d 506 (2 Cir. 1961).

In determining whether a motion for a directed verdict should be granted or denied the Court must view the evidence in the light most favorable to the non-moving party and give him the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn and then after taking that view of the evidence must decide whether or not reasonable men could return a verdict for the non-moving party. *Fortunato v. Ford Motor Company*, 464 F. 2d 962 (2d Cir. 1972).

The Supreme Court of the United States in *Baker v. Texas & Pacific Railway Company*, 359 U.S. 227, 79 S. Ct. 664, in dealing with the question of directed verdicts held that it is only when reasonable men cannot reach differing conclusions that the question may be taken from the jury and a verdict directed in favor of one party or the other. As this Court said in *Diapulse Corporation of America v. Birtcher Corporation*, 362 F. 2d 736, 743:

"The directed verdict device was designed to be utilized in appropriate cases to spare the jury from lengthy deliberation when the evidence did not warrant it. When a party moves for a directed verdict the trial judge must determine as a matter of law whether there is sufficient evidence to take the case to the jury. 'Only if reasonable men could not reach differing conclusions

on the issue may the question be taken from the jury.' *Baker v. Texas & Pac. R.R. Co.*, 359 U.S. 227, 228, 79 S. Ct. 664, 665, 3 L. Ed. 2d 756 (1959); see, e.g., *Lifetime Siding, Inc. v. United States*, 359 F. 2d 657 (2d Cir. 1966); 5 Moore, *Federal Practice*, section 50.02 (1), p. 2314."

See also *Studley v. Gulf Oil Corporation*, 386 F. 2d 161 (2d Cir. 1967). *Hohmann v. Packard Instrument Company, Inc.*, 471 F. 2d 815; *Seganish v. District of Columbia Safeway Stores*, 406 F. 2d 653.

Under the circumstances in this case it was error for the Trial Court to have directed a verdict in favor of De Mauro on the issue of unseaworthiness since there was ample testimony for jury consideration on the question of unseaworthiness from which the jury might well have resolved this question in favor of Central.

POINT II

The Award of \$200,000 to the Plaintiff Was Grossly Excessive.

Plaintiff's earning records, as compiled by the New York Shipping Association, indicate that in 1970 plaintiff earned approximately \$4,000 (42A). Plaintiff himself testified that in 1970 he earned \$6,000 (35A) and his income tax returns, including his wife's income, indicated earnings in the neighborhood of \$8,000. On the basis of an average of these three figures plaintiff's lost earnings from the date of the accident, March 31, 1971, to the date of trial, which ended on March 1, 1974, would be approximately \$18,000.

Plaintiff's own doctor, Dr. George Seaman, testified that plaintiff could do other work as a longshoreman and could work as a dockman (192A, 193A). Dr. Seaman said that the plaintiff could walk up and down stairs and while Dr. Seaman felt that the plaintiff could not work at a construction job it was his opinion that there were many jobs that the plaintiff could do in the way of manual labor (171A, 172A).

Dr. Seaman testified that the doctors, who operated on the plaintiff's leg, did a beautiful job (178A) and he described the result as an excellent one (185A, 186A). Dr. Seaman's opinion with respect to the plaintiff's disability was based upon quadriceps atrophy, which he did not measure because he claimed that such measurements were peculiarly unreliable (176A). Nevertheless, Dr. Seaman said that exercise would restore the quadriceps muscle to normal (177A) but he, for reasons best known to himself, did not recommend such exercise or therapy (183A, 194A).

Although Dr. David Graubard testified that the plaintiff had a 45% loss of use of the right leg, he said that this was due to calcification of the top of the femur (220A). Strangely enough Dr. Seaman said that this calcification of the head of the femur was not a cause of plaintiff's disability (186A, 187A), Dr. Seaman being of the opinion that the quadriceps atrophy was the cause of plaintiff's disability. Significantly, Dr. Seaman did not make any measurements with respect to this atrophy (176A).

Dr. Joseph Andriola, on the other hand, examined the plaintiff on May 1, 1972 and found that his disability was not causally related to the accident of March 31, 1971 but was due to his extreme obesity which was producing cardio-pulmonary symptoms (272A, 273A). Dr. Andriola

found no atrophy, no limitation of motion or flexion or extension, no instability of the right knee and no limitation of motion any place. It was Dr. Andriola's opinion that DeMauro could return to work as a longshoreman when he saw him on May 1, 1972 (272A, 273A).

Dr. Tagliagambe testified that he examined the plaintiff on November 20, 1973 and although he found a defect not in excess of 10% of the right leg with some mild restriction of internal and external rotation, he found no atrophy, no shortening, no deformity and it was his opinion that plaintiff was able to return to work as a longshoreman at that time (302A-307A). DeMauro admitted that no doctor had told him he could not work (64A) and, in fact, Dr. LaPilusa, the treating doctor who operated on DeMauro, told him that he could go back to work in April of 1972 (58A-60A). It is thus apparent that there was no justification in the record for any award by the jury of future lost earnings and regardless of what the jury might have awarded the plaintiff for the injury itself, and pain and suffering, there is no basis for an award in the aggregate sum of \$200,000. Such an amount is not only grossly excessive but shocking to the conscience.

In considering not only the injury itself but also the subjective claims of the plaintiff and the opinion of his own doctors it is respectfully submitted that by any standards an award of \$200,000 was excessive. A motion having been made to the Trial Court respecting damages and denied, this Court has the right to examine the amount of the verdict and to set aside or reduce it if it is excessive. *Caldecott v. Long Island Lighting Company*, 417 F. 2d 994; *Dagnello v. Long Island Railroad Company*, 289 F. 2d 797; *Wicks v. Henken*, 378 F. 2d 395; *Sharkey v. Penn Central Transportation Company*, 493 F. 2d 685.

The excessiveness of awarding \$200,000 to the plaintiff in this case can be gauged by the amounts of recovery in other cases involving much more serious injuries. In *Yost v. General Electric Company*, 173 F. Supp. 630, \$125,000 was awarded for the amputation of a left arm 2" below the elbow and 4 distal and middle phalanxes of the right hand. In *Conte v. Flota Mercante*, 189 F. Supp. 67, \$55,000 was awarded for the amputation of the right hand at the wrist. In *Pierce v. United States*, 142 F. Supp. 721, aff'd. 235 F. 2d 466, damages of \$54,000 were awarded for burn injuries which resulted in both arms being amputated above the wrist. In *St. Louis Southern Railroad Company v. Ferguson*, 182 F. 2d 949, there was an award of \$150,000 for the amputation of the left leg and for a right arm that was severed 3" above the wrist. In *Carlson v. Chisolm-Moore Hoist Corporation*, 281 F.2d 766 this Court affirmed a judgment of \$50,000 for injuries which included amputation of the plaintiff's left thumb as well as his right thumb, index finger and middle finger. In *Elliot v. United States Steel Corporation*, 194 F. Supp. 936, there was a recovery of \$45,000 for traumatic amputation of the index, middle and ring fingers together with a portion of the right thumb.

Plaintiff in this case was a man 5'5" tall who weighed 230 pounds, whose disability in the opinion of Dr. Andriola was due to his extreme obesity which was producing cardiopulmonary symptoms. Plaintiff, by his own admission, did not try to go back to work in January of 1972 when Dr. LaPilusa, the treating doctor who operated on him, told him he could go back to work and made no effort to return to work in April of 1972 when Dr. LaPilusa told him for the second time that he could go back to work. He apparently chose not to work for the purposes of the lawsuit so that when the case went to trial it appeared that he had been out of work for approximately 3 years.

The injury in this case consisted of a fracture of the right femur which healed perfectly due to the fact that a pin was inserted in the bone canal thus holding the ends of the bone in proper alignment resulting in what plaintiff's own doctors described as a beautiful job and an excellent result. In view of the testimony of defendant's doctors that the plaintiff could return to work as a longshoreman and the general consensus of medical opinion that he could do many jobs in the way of manual labor it is apparent that the injury sustained by the plaintiff was not a crippling or disabling injury and nowhere as serious as to warrant an award of \$200,000.

POINT III

The Proof in This Case Established Conduct on the Part of the Shipowner Precluding Indemnity and Should Have Been Presented Clearly by the Trial Court to the Jury.

Turning to the third party complaint, SANTIAGO GONZALEZ, the Chief Mate aboard the SS GREENPORT, testified by deposition which was read into evidence that it was his job to supervise the work of the longshoremen in loading and unloading the vessel. It was his testimony that the cases which ultimately fell upon the plaintiff were stowed aboard the vessel in Oakland, California, and that when the loading operations were completed the lower 'tween deck on the #4 hatch was inspected by ship's personnel (261A). GONZALEZ further testified that on March 31, 1971 it was part of his job to supervise the work of the longshoremen to see that they discharged the vessel properly (141A, 142A). He also testified that at no time on March 31, 1971, the date of DeMauro's accident, did either he or the third mate have any complaint with the

way stevedoring operations were being conducted by I.T.O.

It is thus apparent that Central by its own admission and the testimony of its chief officer was responsible for both the loading and unloading operations. Certainly, Central was responsible for the loading operations and if these cases were not properly stowed when they were loaded aboard the vessel in Oakland, California, the ship's officers should have noticed this and had this condition corrected when they inspected the loading operations during the commencement thereof and after the same were completed in Oakland (261A).

Manifestly, if the ship's officer were satisfied with the way these cases were stowed in Oakland, California, on the basis of the inspection they conducted, I.T.O. who was only required to make a cursory inspection, (*Ignatyuk v. Tramp Chartering Corp.*, 250 F. 2d 198) cannot be faulted. On the other hand, if the cases were not properly stowed, or not shored or braced, then Central would be at fault and responsible for the improper stowage and for undertaking a voyage and endangering the safety of the ship and the cargo for which it was concededly responsible (345A, 346A).

Since Central's chief mate testified that he not only supervised the loading operations but that he and the third mate supervised the unloading operations as well and that he was responsible for both these operations his testimony that he did not have any complaints with the way the unloading operations were being conducted absolves I.T.O. of any claim of an unworkmanlike performance and constitutes conduct on the part of the shipowner which would preclude indemnity. The issues of whether a stevedore has breached its warranty of workmanlike service and whether there was conduct on the part of the shipowner precluding indemnity have uniformly been held to be factual issues for

resolution by a jury. *Weyerhaeuser v. Nacirema Operating Company*, 355 U.S. 563, 78 S. Ct. 438.

In *Thompson v. Trent Maritime Company*, 353 F. 2d 632 (3d Cir. 1965), a case involving a longshoreman who was injured while working in the hold of a ship discharging bales of wool when a piece of dunnage under one of the bales flew out and struck another piece on the floor causing it to hit his right foot, the Court stated the rule with respect to indemnity precluding conduct as follows (641):

"In our case, one of the longshoremen, Bernard Troutman, who was in the No. 3 hold on the day Thompson was injured, testified, without being contradicted, that when the condition of the hold was called to the mate's attention, his response was: 'Just leave it lay there. That is all right.' It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work. *Hagans v. Farrell Lines, Inc.*, 237 F.2d 477 (C.A. 3, 1956); *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32 (C.A. 3, 1961); *United States v. Harrison*, 245 F. 2d 911 (C.A. 9, 1957."

See also *United States v. Harrison*, 245 F. 2d 911 and *Moore-McCormack Lines v. Maryland Ship Ceiling Co., Inc.*, 311 F. 2d 663.

In the *Moore-McCormack Lines v. Maryland Ship Ceiling Co., Inc.* case, *supra*, an action by a ship's carpenter to recover damages as a result of inhaling cyanide fumes emanating from tobacco which had previously been fumigated by hydrogen cyanide by an agent of the shipowner, a verdict was returned in favor of the plaintiff as against

shipowner and the shipowner's motion for a directed verdict in its favor against the impleaded employer of the plaintiff was denied. The Court in affirming this verdict stated at p. 668:

"The primary cause of the injury was the unseaworthiness of the ship. The jury found that the ship ceiling company was free from negligence in causing its men to enter the hold of the ship since it had no knowledge of the dangerous conditions, could not have reasonably been expected to know of the presence of the hydrogen cyanide gas and was led to proceed with its work by the assurances of the Relief Mate of the ship that it was safe to do so. We think that there was substantial evidence to support the ruling of the Judge and the findings of the jury in this respect and that the facts of the case warrant the finding that the performance of the ship, in the language of the Supreme Court in the *Weyerhaeuser* case, 355 U.S. 563, 567, 78 S. Ct. 438, 440, amounted to 'conduct on its part sufficient to preclude recovery.'"

If the cases had been stowed in Oakland, California, on top of an uneven cargo of pipe without shoring or bracing GONZALEZ should have seen and corrected that condition before the ship sailed. However, if the vessel sailed with these cases stowed on top of an uneven cargo of pipes and with shoring and bracing in place then it was GONZALEZ' duty to see that the shoring and bracing was strong enough to withstand the voyage and not become weakened as a result of pounding and pressure during a rough and turbulent voyage to the point where the cases could break through the shoring and fall upon the plaintiff during the course of unloading operations. On either version, since there was no proof that the stevedore re-

moved the shoring, the accident was the fault and responsibility of the shipowner particularly since the photographs in evidence show the shoring under the cases after the cases fell.

There is ample testimony in this case reflecting conduct on the part of Central sufficient to preclude indemnity from I.T.O. and the jury would have been in the position to determine this issue if the Court had properly handled the issue. In *Waterman Steamship Co. v. David*, 353 F. 2d 660 (5th Cir. 1965), the Court, in discussing what conduct on the part of a shipowner would be sufficient to preclude indemnity said (Pages 665 and 666):

"If a vessel's unseaworthiness prevents the stevedore's workmanlike performance, that is 'conduct' on the part of the shipowner 'sufficient to preclude recovery', and to excuse even a negligent breach by the stevedore."

* * *

"Here the jury concluded that in spite of Atlantic's negligence, the defective roller beam assembly was the proximate cause of the accident and amounted to conduct on the part of the shipowner sufficient to preclude indemnification. We cannot say that the jury was confused or inconsistent or that the record fails to support the jury's finding."

In *Humble Oil and Refining Company v. Philadelphia Ship Maintenance Company*, 444 F. 2d 727 (1971) the Court in reviewing the cases dealing with indemnity came to the conclusion that the test for indemnity would be better articulated in terms of shifting the risk of loss rather than setting up standards of conduct. Once a condition of unseaworthiness has been established in a direct action against the shipowner the burden then falls on the

shipowner to demonstrate that this condition was caused or activated by the stevedore and that such conduct constituted a breach of the implied warranty of workmanlike service. In dealing with the question of conduct on the part of the shipowner precluding indemnity the Court said at Page 732:

"Whether the shipowner has created conditions which so impede the stevedore's performance that his breach may be excused is a weighing process, *Waterman Steamship Corp. v. David*, supra, peculiarly within the province of the factfinder. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 792 (1962)."

Thus, one of the key issues in this case is whether Central's conduct was such as to preclude indemnity even if the jury found that the stevedore had breached its warranty of workmanlike performance. That issue as such was not presented to the jury in the form of a special verdict *even though counsel for I.T.O. requested that special written interrogatories be given to the jury* requesting findings from the jury as to whether the stevedore had breached its warranty of workmanlike performance and whether the shipowner was precluded from recovering indemnity from the stevedore by virtue of its conduct in this case (609A, 610A). This request was refused by the Court and the interrogatories were marked as Court's Exhibit 2 (609A).

While there is no doubt that the Court may seek a special verdict or a general verdict with written interrogatories for the jury to answer, in this case the Court erred in not submitting to the jury written interrogatories which would have properly covered this issue.

POINT IV

The Jury's Verdict on the Third Party Complaint Was Against the Weight of the Evidence.

In his answers to interrogatories, propounded by Central, DeMauro repeatedly claimed that his accident was caused by a collapsing cargo fence (498A) and that Central was negligent in permitting and allowing this cargo fence to be erected in the #4 hatch in such a position and condition as to allow it to readily collapse and fall (499A). In his answers to interrogatories, which were sworn to by DeMauro on February 1, 1973, he further claimed that Central was negligent and its vessel unseaworthy in that Central permitted and allowed storage of cargo behind this cargo fence in such position and condition as to cause the said fence to collapse (499A).

DeMauro further claimed that Central had actual notice of these conditions by reason of the fact that the ship came in with the cargo fence and cargo in this condition and that Central knew of this condition or should have known of it (499A, 500A).

DeMauro further claimed that Central's vessel was unseaworthy in that the cargo fence erected was unsuitable and unsafe (500A, 501A). Finally, DeMauro claimed that Central was negligent and careless in that it permitted and allowed cargo to be stowed behind the cargo fence which was not suitable, secure or proper so that when the fence fell cargo behind the fence struck the plaintiff (501A, 502A).

At the trial of this case the plaintiff and his witnesses testified that the cases which fell and hit him were not braced or shored in any way and that there was no cargo

fence supporting these cases or between these cases and the other cargo which they were in the process of removing when the accident happened (50A, 90A, 98A, 111A). Strangely enough this testimony was given by DeMauro and his witnesses despite the fact that DeMauro in his sworn answers to interrogatories claimed that there was a cargo fence bracing and securing the cases which fell and struck him, and despite the fact that DeMauro claimed in these answers that he was struck by a collapsing cargo fence, and only added in ink as an afterthought the words "and cargo behind the fence fell on him".

Since there are only two possible versions of how this accident happened and since the version offered by DeMauro and his witnesses in their direct testimony at the trial is incredible the only logical version of how this accident happened is the I.T.O.'s version. It is apparent that these cases could not have survived a stormy voyage and remained on top of the pipe without any shoring or bracing, particularly since there was an 18" space between these cases and the adjoining palletized cargo which was not supporting the cases (395A).

It is equally apparent that for the cases to be sitting on top of each other and on top of this uneven base of pipes they must have been braced or secured in order to survive the rough voyage and arrive in Bayonne in this position. There is no testimony in this case upon which any inference could be based that I.T.O. had removed the shoring that was bracing and holding these cases, and since the shoring is shown underneath the cases in the photographs, which were taken shortly after the accident (397A, 400A), there can be no question but that the shoring was in place when the accident happened and the cases did in fact break through the shoring as DeMauro claimed in his answers to Central's interrogatories. It is obvious that if

the longshoremen had removed the shoring these cases would not have remained in place for 25 or 30 minutes as testified to by DeMauro but would have fallen immediately as soon as the shoring was removed.

In either event there was no violation by I.T.O. of the regulation requiring that precautions be taken, when necessary, to prevent the remaining cargo from falling during the course of breaking down operations. Since the shoring and bracing would have had to be in place while the palletized cargo was being removed it was not necessary to take any precautions to prevent these cases from falling. The longshoremen were entitled to assume that the shoring and bracing would hold, and having made the cursory inspection required, it was not necessary or required that the longshoremen take any further action with respect to this shoring. *Vaccaro v. Alcoa*, 405 F. 2d 1133, *Ignatyuk v. Tramp Chartering Corp.*, 250 F. 2d 198.

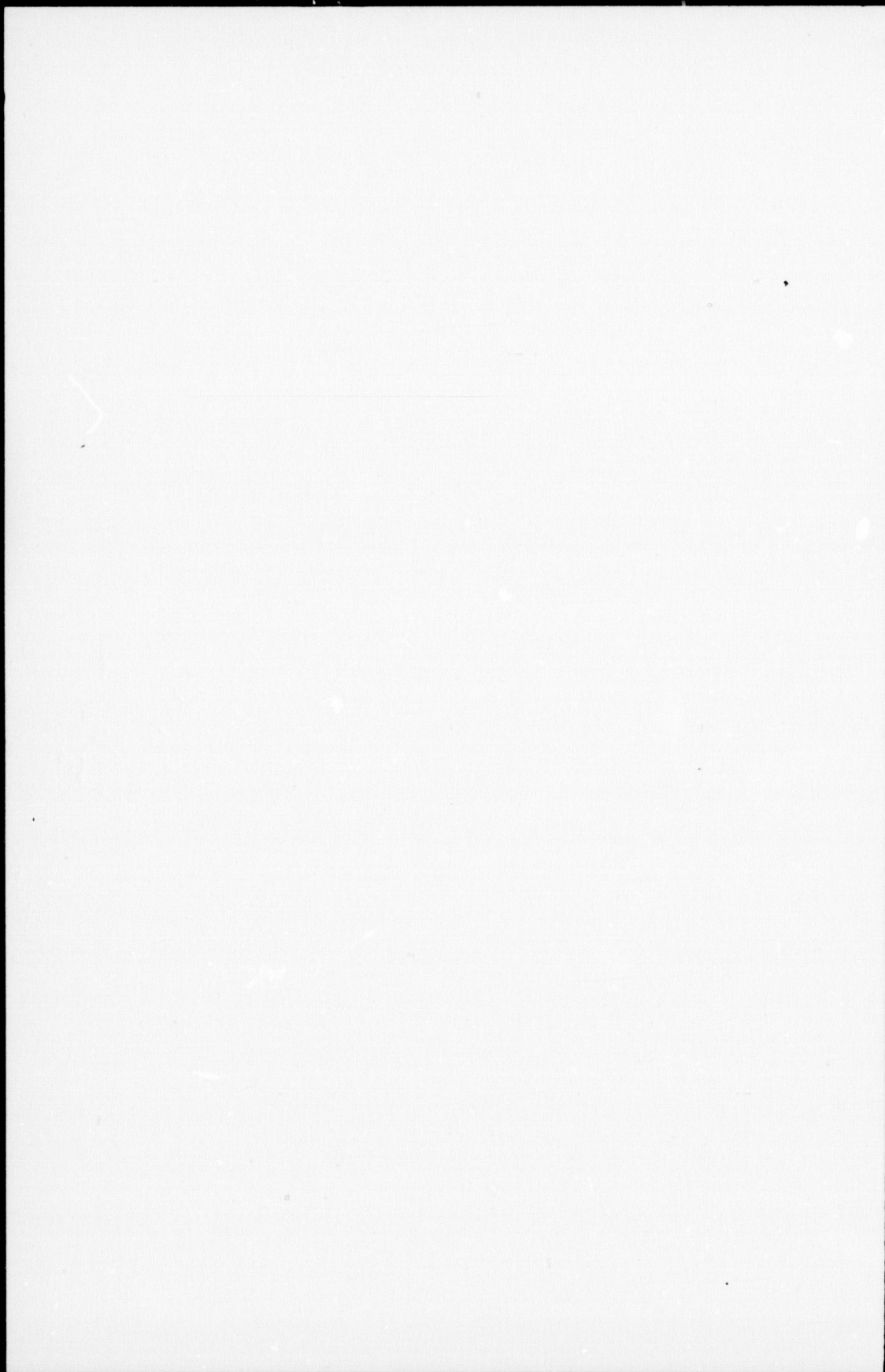
Since the palletized cargo was not supporting the cases which ultimately fell and struck the plaintiff the removal of this cargo by the longshoremen, which they were required to do in order to unload the vessel, would not have constituted removal of lateral support.

On either version of the accident presented at the trial, Central was responsible for the condition of the stow which was the proximate cause of the accident and the injuries sustained by the plaintiff. Under the facts in this case the jury's verdict on the third-party complaint was against the weight of the evidence since under neither version presented at the trial did I.T.O. breach its warranty of workmanlike performance. The testimony in this case clearly shows that I.T.O. performed the unloading operation in a workmanlike manner and that the cause of plaintiff's accident was the improper and defective manner in which the cases

were stowed in the loading port. The testimony in this case further indicates that I.T.O. did not do or fail to do anything which in any manner caused or contributed to the happening of DeMauro's accident.

At no time did the longshoremen touch the cases which ultimately fell upon the plaintiff and there is no evidence in this case to the effect that the longshoremen did anything which caused these cases to fall. There is also no evidence in this case that the longshoremen worked on these cases at any time prior to plaintiff's accident. Nor is there any proof that the longshoremen removed the shoring prior to plaintiff's accident.

There was proof that the longshoremen conducted the cursory inspection required of them and, as Mr. Pinto testified, he saw the cases the day before with shoring supporting them and they looked secure to him. The jury verdict on the third-party action should be set aside so as to prevent a miscarriage of justice. *Whiteman v. Pitrie*, 220 F. 2d 914, *Boeing Company v. Shipman*, 389 F. 2d 507, *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F. 2d 1033.



CONCLUSION

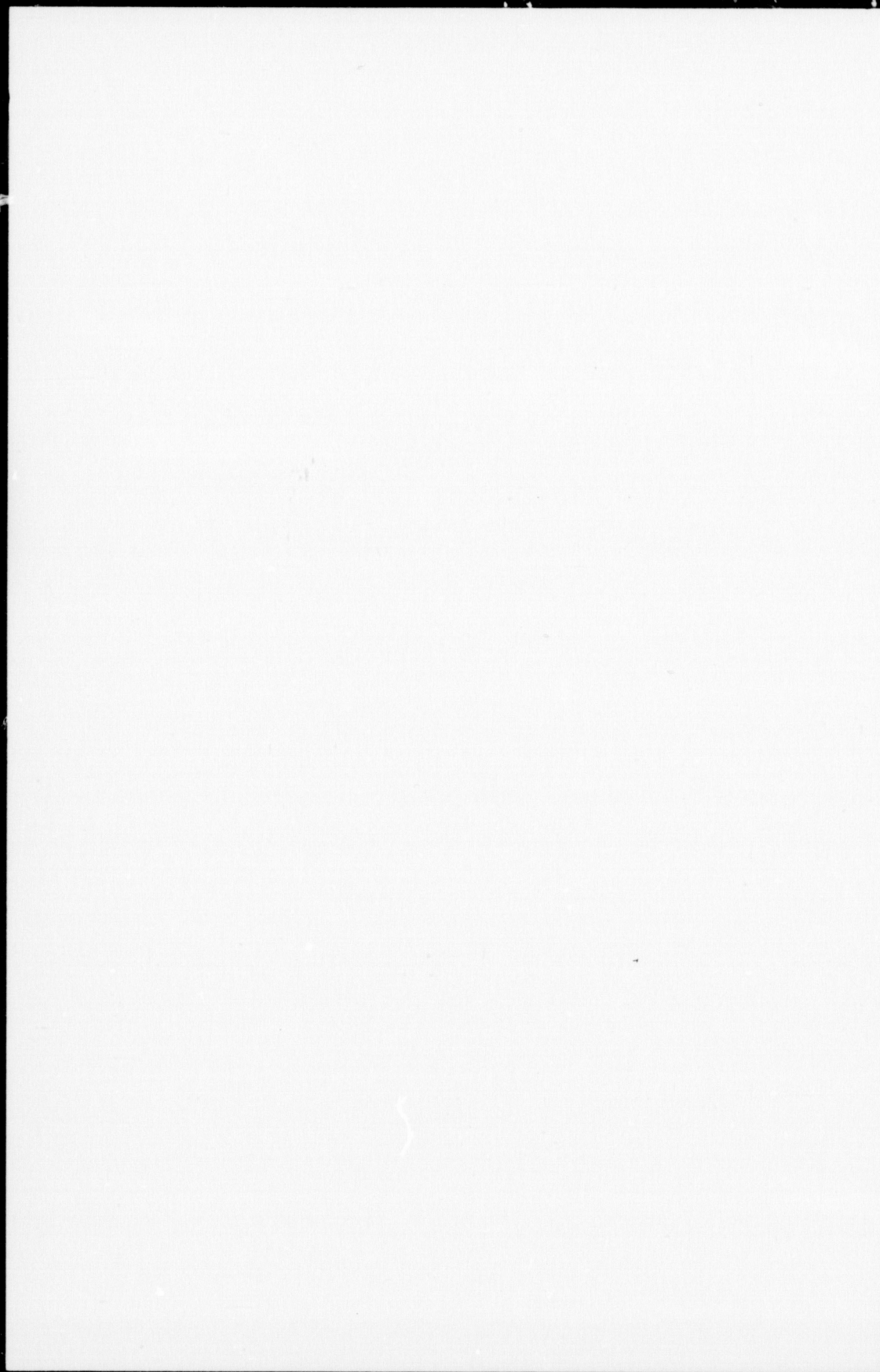
The judgment in favor of the plaintiff should be reversed and a new trial required. The jury verdict on the third-party complaint should be set aside, the judgment in favor of the shipowner reversed and the third-party complaint should be dismissed or the entire case should be sent back for a new trial.

Respectfully submitted,

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Of Counsel



Service of 2 copies of this within
BRIEF is admitted this
1st day of DECEMBER 1974.

[Signature]
ATTORNEY FOR DEFENDANT + THIRD PARTY
PLAINTIFF - APPELLEE

